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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/692,857
Filing Date: October 27, 2003
Appellant(s): KROL, JAMES D.

Theodore Breiner
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 1/8/07 appealing from the Office action mailed 9/7/06.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

RecipeUSA, Pizza-Low Carb, August 15, 2003.

The Google Disclosure Group, April 1, 2003.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over the recipes for " Crustless Pizza" in view of the Groogle Group disclosure.

The recipe for Deep Dish Pizza teaches sprinkling shredded cheese over the bottom of dish, spreading on pizza sauce, sprinkling mozzarella, piling on topping and baked until bubble and brown. The pizza is allowed to stand for 10 minutes before cutting.

The recipe does not teach forming a mixture of high gluten flour and baking powder, the baking temperature as claimed, freezing, thawing and reheating.

The disclosure on April 1 2003 shows that it is known to make low carbohydrate crust using a little flour and some whey protein.

It is known in the art to make low carbohydrate pizza by making low carbohydrate crust using little flour and whey protein. It would have been obvious to one skilled in the art to add flour and protein to the crust in when making the Deep Dish Pizza to obtain different texture and flavor. The pizza is still low in carbohydrate because only little flour

is used; specifically, how little the amount of flour can be can vary depending on the taste, texture and amount of carbohydrate desired. It would have been obvious to use high gluten flour because such flour is well known in the art and its use further reduces the carbohydrate content and is equivalent to the use of flour in combination with protein as taught in the prior art because high gluten flour has a higher protein content than regular flour. It would have been obvious to add baking powder to create bubbling appearance or to give little rising to make a firm structure. This is well known in the art as it is common to add baking powder to product containing flour. It would have been obvious to make up a batch of flour for use in multiple times; this would have been a matter of preference. It would have been obvious to select specific amount of flour depending on the carbohydrate content wanted. Since little flour is used, it is obvious the flour can be as little as 1 teaspoon; the amount used can vary depending on parameters such as carbohydrate content, taste, texture, flavor etc... It would have been obvious to use double acting baking powder when one wants a faster reaction. It would have been obvious to use higher temperature for shorter period of time. It would have been obvious to freeze the product for long term storage. When the product is frozen, it would have been obvious to thaw and reheat it to prepare the product for consumption.

(10) Response to Argument

On page 10 of the appeal brief, appellant argues the" Deep Dish Pizza" recipe teaches away from a dry mixture of formulated flour and cheese by disclosing a liquid egg mixture being added to the cheese base layer. It is not clear how applicant view this as teaching away from a dry mixture. The recipe teaches to

form a base layer of cheese over the bottom the dish. The cheese is a dried layer. The egg mixture is placed on the cheese layer; it is not the base layer. The disclosure by the Google group indicates that pizza crust formed of little flour and whey protein is known. Thus, it would have been obvious to add a little flour and protein to the Deep Dish pizza crust to obtain a different texture in the crust than just from the cheese alone. Appellant argues the Google Group disclosure does not disclose a base layer being a formulated flour and cheese and does not disclose a food product or pizza without a crust. The Google disclosure is a low carbohydrate pizza crust with the crust being made of little flour and some whey protein. Since the crust is made of little flour and protein, it is essentially without a crust because regular pizza crust is not made out of just a little flour. The recipe for Deep Dish pizza shows the use of cheese as the base layer; the Google disclosure shows the use of little flour and protein as the base layer. Both recipes are for low carbohydrate pizza; thus, it would have been obvious to one skilled in the art to combine the ingredients to make the base layer to contain both cheese little flour and protein to obtain different texture, flavor and taste. Appellant does not argue why this combination would not have been obvious to one skilled in the art. Combining different ingredients to make food product to have particular taste, flavor, protein content, carbohydrate content are not unknown in the food technology. This is evident in the recipes for the crustless pizza. For example, the " Deep Dish Pizza" teaches to make a base using cheese and then having an egg mixture over the cheese while the " Diet-Right Pizzas" teaches to make the

base out of sausage or meat, onion, garlic and seasoning. Then, there is teaching of making the base out of flour and protein. Thus, to combine any of these ingredients to obtain specific taste, texture, flavor, protein content and carbohydrate content would have been obvious to one skilled in the art. With respect to claims 2-10, appellant makes the same argument that the prior art does not disclose each and every element of the claims. It is already acknowledge in the rejection how the prior art does not disclose the elements in the dependent claims. It is also already addressed how the missing elements are obvious to one skilled in the art. Appellant does not argue the obviousness position taken. With respect to claims 4-7, the base layer would contain additional ingredient when the flour and whey protein is added to the cheese layer of the Deep Dish Pizza recipe. With respect to claims 5-6,8-9,10, 19,25 the recipe teaches to pile on the favorite toppings; all the toppings claimed are well known. It would have been obvious to use any topping as a matter of taste preference. With respect to claims 11-16, 22 appellant makes the same argument as above. The argument is not persuasive for the reason stated above.

For claims 17, 23, it is argued that it would have been obvious to increase or decrease the temperature in relation to the time of baking. For example, it would have been obvious to use higher temperature for shorter period of time. Appellant does not argue this position. For claims 18,24, it is notoriously well known in the art to cool the product after baking either for consumption or for

packaging because it is hard to handle hot product from the oven. The recipe teaches to allow standing for 10 minutes before cutting. The temperature at which one cools to can readily be determine as to which temperature facilitate the most convenient handling. The recipe teaches to cut the food product. With respect to claims 20, 26, it is set forth in the rejection to freeze the product for long term storage. When the product is frozen, it would have been obvious to thaw and reheat for consumption. Appellant does not argue why this would not have been obvious. The heating apparatus claimed in claim 21 is notorious well known and would have been obvious to one skilled in the art to use.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Lien Tran

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